



In the Supreme Court of the United States

OCTOBER TERM 1942.

No. ~~1080~~ 92

THE SWAN CARBURETOR COMPANY,
Petitioner,

vs.

THE NASH MOTORS COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Circuit Court of Appeals
For the Fourth Circuit, and
BRIEF IN SUPPORT OF PETITION.

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To the United States Circuit Court of Appeals
FOR THE FOURTH CIRCUIT.

To the Honorable The Chief Justice and the Associate
Justices of the Supreme Court of the United States:

The petition of The Swan Carburetor Company respectfully prays the issue of a writ of certiorari to review the opinion of the Circuit Court of Appeals for the Fourth Circuit in the case numbered in that Court No. 5026, and in which this petitioner was plaintiff-appellant and cross-appellee and the respondent, The Nash Motors Company, was defendant-appellee and cross-appellant, and to review and revise the decree and order entered pursuant to such opinion and the particulars of which case and of such opinion and decree are hereafter specified. The transcript of the record, including the proceedings in the Circuit Court of Appeals, has been filed herein pursuant to Rule 38. The following is the

(A)

Summary Statement of the Matter Involved: It is the rule that in an accounting to recover profits (as distinguished from damages) for infringement of a patent where the patented structure has been commingled by defendant with a larger structure or ensemble in such a way that the profits on the patented structure cannot be separated from those on the ensemble, or larger structure, either by accurate or approximate apportionment, the profits on the entire ensemble go to the patentee. Is the rule changed by the proportions or the relations between the sizes of the ensemble and the patented structure? The basic rule was made by this Court in *Westinghouse v. Wagner*, 225 U. S. 604, 618 and has ever since been followed by the Courts in all the Circuits and Districts where the patented structure constituted a lesser part of the larger ensemble, regardless of the relations between the sizes. In the instant case the patented structure was a manifold used upon an automobile. The Court below in the instant case is at variance with the other Courts in the other Circuits in the following holding, stated and followed by the Court of Appeals for the Fourth Circuit (T. R. Vol. VI, p. 8):

“The burden of separating the profits at his peril, however, does not rest upon the defendant when he uses the patented structure without change as part only of a larger machine and there is no practicable way in which apportionment records may be kept.”
(Emphasis ours.)

The Court then awarded no profits to the patentee.

There is, therefore, diversity of decision between the Court of Appeals in the Fourth Circuit and the Courts in the other Circuits, for example, in the Eighth Circuit which awarded all of the profits on the ensemble to the plaintiff on a transformer when the patented structure

was without change a part only of the larger machine, i.e., the transformer.

(B)

Reason Relied Upon For the Allowance of the Writ:
The ruling of the Court of Appeals in the Fourth Circuit in the instant case is diverse from and contrary to the ruling in the other Circuits, including the Eighth Circuit Court of Appeals in *Westinghouse v. Wagner*, 281 Fed. 453, 464-465, on appeal from the remand to the District Court following the ruling of this Court in 215 U. S. 604. In the instant case the Court below awarded the plaintiff no profits where the defendant had so commingled the profits on the patented device with those on the ensemble that they could not be separated by accurate or approximate apportionment and where the patented structure was without change a part only of a larger machine, and in the Eighth Circuit under similar conditions and circumstances the Eighth Circuit Court of Appeals awarded the entire profits to the plaintiff. The practice in the Eighth Circuit is followed in the other Circuits.

In the instant case the patented structure was part of an automobile. In the Eighth Circuit case the patented structure was part of a transformer. In each case the patented structure was "without change" a lesser part of a larger machine. In each case the plaintiff proceeded with his proof showing precisely the same agenda.

WHEREFORE, your petitioner respectfully prays that a writ of Certiorari be issued under the seal of this Court, directed to the United States Circuit Court of Appeals for the Fourth Circuit, commanding the said Court to certify and send to this Court, on a day to be designated, a full and complete transcript of the record and all proceedings of the Circuit Court of Appeals had in this cause, to the end that this cause may be reviewed and determined by this Court, and that the judgment of the Circuit Court

of Appeals be reversed in the respect noted, and that defendant's commingled profits be awarded to plaintiff.

Dated:

THE SWAN CARBURETOR COMPANY,
By F. O. RICHEY,

B. D. WATTS,

H. F. SCHNEIDER,

Its Counsel.

RICHEY & WATTS,

EDWIN F. SAMUELS,

Of Counsel.

